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NO. _____

in the

Supreme Court

of the

United States

October Term, 1986

STANLEY TRANOWSKI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. (Re: Judgment Order 86-1649)

Appendix

STANLEY E. TRANOWSKI
Petitioner Pro Se

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64pp

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APPENDIX

EXHIBIT "ONE" EXHIBIT "ONE"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO ILLINOIS

December 12, 19 86

Before

Hon. WALTER J. CUMMINGS, Cir. Judge

Hon. HARLINGTON WOOD, Jr. Cir. Judge

Hon. RICHARD D. CUDAHY, Cir. Judge

No. 86-1649	) Appeal from the
	) United States Court
UNITED STATES OF AMERICA,	) for the Northern
	) District of Illinois
Plaintiff-Appellee	) Eastern Division.
	)
vs.	) No. 76 CR 803
	) John P. Grady, Judge.
STANLEY EUGENE TRANOWSKI,	)
	)
Defendant-Appellant	)

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by defendant-appellant on November 10, 1986, all

of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO ILLINOIS 60604

(Submitted October 9, 1986)*

October 31, 19 86 (UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 3

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. HARLINGTON WOOD, Jr. Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) Appeal from the United States District Court for the Northern District of Illinois Eastern Division
No. 86-1649 v.	
STANLEY EUGENE TRANOWSKI, Defendant-Appellant,	) No. 76 CR 803
	) JOHN P. GRADY, Judge

O R D E R

Over twelve years ago, a man passed a counterfeit five-dollar bill at a Burger King in Chicago, Illinois. In 1977, a jury found Stanley Tranowski guilty of passing that bill in violation of 18 U.S.C., Sec. 472.

Tranowski was sentenced to six years imprisonment and has since fully served that sentence, including the portion during which he was released on parole. Tranowski has already been before us three times (p. 2) challenging the validity of his conviction. See United States v. Tranowski, No. 78-1272 (7th Cir. Sept. 25, 1978) (unpublished order) (affirming conviction on direct appeal), cert. denied, 440 U.S. 947 (1979). United States v. Tranowski, No. 79-1989 (7th Cir. June 7, 1982) (unpublished order) (affirming denial of motion for new trial based on newly discovered evidence); Tranowski v. United States, No. 85-1599, (7th Cir. Nov. 15, 1985) (unpublished order) ("Tranowski III") (vacating grant of new trial and remanding for further proceedings in light of a recent Supreme Court opinion) 1/

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34 (a). Fed. R. App. P.; Circuit Rule 14 (f). Defendant-Appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

In his fourth case before us, Tranowski is attempting to reverse the district court's denial of a new trial following our remand in Tranowski III. Without meaning to criticize Tranowski's preserverance in attempting to prove his innocence, we express our hope that the present case can help bring to a conclusion more than a decade of litigation.

I

On May 12, 1974, somebody passed a counterfeit five-dollar bill to a cashier at a Burger King restaurant in Chicago. A number of people chased after a man who was down the street from the restaurant holding a Burger King bag, and who, based on the cashier's description, was believed to be the passer of the bill; but they

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1/ The facts of the underlying conviction were also before us in United States v. Tranowski, 659 F. 2d 750 (7th Cir. 1981), in which we reversed the conviction of Walter Tranowski, Stanley's brother, for allegedly committing perjury at Stanley's trial. We revisited that case in United States v. Tranowski, 702 F. 2d 668 (7th Cir. 1983), cert. denied, 463 U.S. 1217 (1984), in which we held that a retrial of Walter Tranowski would not constitute double jeopardy.

were unable to catch him. Subsequently, Stanley Tranowski was indicted for passing the counterfeit bill in violation of 18 U.S.C. Sec. 472. At trial, the cashier could not identify Tranowski as the perpetrator, nor could another employee, who chased the suspect, identify Tranowski as the man he chased. Only Peter McGhee, a thirteen-year-old boy who had joined in the chase, was able to identify Tranowski at the trial and he could only say that Tranowski was the man being chased; he had no first-hand knowledge regarding who passed the bill. The only other significant incriminating evidencepresented by the government at trial was evidence that Tranowski had previously purchased, under two different aliases, substantial quantities of the type of paper on which the countefeit bill was printed. A jury

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1/ We note, though, that apparently the government never retried Walter.

found Tranowski guilty of the offense charged and, in March 1978, the court sentenced him to six years of incarceration. (p. 3)

In July 1980, Tranowski filed a motion under 28 U.S.C., Sec. 2255 in which he sought to have his sentence vacated based on various documents he had obtained through use of the Freedom of Information Act. The same judge who presided at the original trial considered the Sec. 2255 motion. In December 1984, the district court ordered that an evidentiary hearing be held, but only to consider one of the grounds raised by Tranowski in his motion. Following the hearing, the district court ruled, in March 1985, that the failure of the government to provide Tranowski with a Secret Service document, which indicated that McGhee had once followed the suspected passer of the bill to a house down the street from where Tranowski lived [2] considered along with other evidence favorable to Tranowski, raised sufficient doubt to entitle him to a new trial. However, in

making that determination the court applied a standard requiring that it find beyond a reasonable doubt that the undisclosed evidence would have no effect on the outcome of the trial. While the proper standard to apply was not clear at the time the district court made its ruling, the Supreme Court subsequently clarified what the proper standard to apply should have been. See United States v. Bagley, 105 S. Ct. 3375, 3384 (1985). Thus, in Tranowski III, we remanded the case for the applicayion of Bagley. In its original oral findings, the district court court had provided a relatively detailed discussion of the facts and applicable law. On remand, the district court only issued a brief order in which it purported to be applying the "reasonable probability" standard of Bagley in holding that the plaintiff was not entitled to a new trial. However, the court also stated "I believe it more likely than not that, had the report been disclosed at trial, the jury

would have concluded . . . .that officer Biswurm was mistaken as to what the witness Christopher (sic) McGhee had told him. Biswurm's statement, contained in the Cozza Report, was therefore not likely to have undermined the jury's confidence in McGhee's testimony identifying defendant as the bill passer." (Emphasis added).

(Page 4) In Brady v. Maryland, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad

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2/ The Secret Service document is a one-page memorandum called the "Cozza Report." In October 1974 Robert Biswurm, a Chicago police officer who also worked part-time as a security guard at the aforementioned Burger King restaurant, called Special Agent Cozza. He told Cozza that McGhee had told Biswurm that McGhee followed the suspected countefeiter to the suspect's "residence" at 5157 West St. Paul Avenue in Chicago. (Tranowski's residence , however, is 5171 West St. Paul Ave). Cozza reduced the phone conversation to a memorandum which was forwarded to the agent handling the case. The Cozza report was never provided to Tranowski prior to his conviction, although the government had been ordered to provide Tranowski with all evidence favorable to him.

faith of the prosecution." 373 U.S. 84, 87 (1963). In United States v. Agur, the Court indicated that the standard for determining the materiality of evidence might vary according to the specificity of the request for evidence. 427 U.S. 97, 103-13 (1976). Bagley, however, made clear that the standard did not vary with the specificity of the request, 105 S. Ct. at 3384. Bagley also made clear the proper materiality standard to apply to the present case. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id.; id. at 3385 (White, J.concurring); United States v. Jackson, 780 F. 2d 1305, 1309-10 (7th Cir. 1986). This is the same materiality standard that is applied to ineffective assistance of counsel claims. See Bagley,

105 S. Ct. at 3383-84; Strickland v. Washington 466 U.S. 668, 694 (1984); United States v. Driver, 798 F. 2d 248, 250-251 (7th Cir. 1986) A "reasonable probability" is less than "more likely than not" and more than "some conceivable effect on the outcome." See Strikland, 466 U.S. at 693.

The district court applied a "more likely than not" standard. This is not the proper standard. See id. However, Tranowski does not object that the court failed to apply the reasonable probability standard; instead his argument is that under the reasonable probability standard he is entitled to a new trial or, alternatively a beyond reasonable doubt standard should apply. Since plaintiff does not object that a "more likely than not" standard was applied and since as previously discussed, we wish to help bring this lengthy litigation to a close, we will not again remand this case to the district court for express application

of the "reasonable probability" standard. Cf. United States v. Wheeler, No. 85-2235, slip op. at 9 (7th Cir. Aug. 22, 1986). We also note that the government contends that in evaluating the effect of the Cozza Report we should not consider other allegedly undisclosed evidence that was the basis of claims dismissed by the district court but not appealed by Tranowski. We disagree. In determinining the materiality of undisclosed evidence "the omission must be evaluated in the context of the entire record . . . if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt." Agurs, 427 U.S. at 112-13. Cf. Strickland, 46 U.S. at 695-96.

(p. 5)

Materiality is a mixed question of law and fact. Cf. Strickland, 466 U.S. at 698. In determining whether Tranowski has met the reasonable probability standard, we

defer to determinations made by the district court. United States v. Kehm, No. 84-3028, slip op. at 7 (7th Cir. Aug. 26, 1986), particularly factual findings, see Strickland, 466 U.S. at 698. The Cozza Report contains double hearsay indicating that McGhee followed a suspected person to a house other than Tranowski's. The district court found, however, that McGhee did not do so and that, instead, Officer Biswurm had reported the wrong address to Cozza. In any event, the district court found that the person McGhee followed was indeed Tranowski. Moreover, the court found McGhee's identification testimony to be highly credible. These findings, of course, are not conclusive on the issue before us ---disclosure of the Cozza Report would still have provided an additional means for attempting to impeach McGhee. We note the findings of the district court, though, because they indicate that the impeachment was less likely to have had a significant impact.

McGhee could have denied he ever made the statement to Biswurm and the prosecution could have reemphasized the certainty of McGhee's identification. The same is true of information that McGhee allegedly said he saw the suspect on Concocrd Avenue or Wabansia Avenue, especially since it was another person's speculation that the suspect lived on one of those streets, and, moreover, McGhee denied mak the alleged statements. That another person's palm print was found on one of the counterfeit bills is of little value in that money is generally handled by a number of people. Tranowski knew the important fact which is that his prints were not found on the money. Finally, we note a key fact that Tranowski trie to downplay. At trial, Tranowski was able to impeach McGhee on the ground that McGhee saw Tranowski buy newspapers at the drugstore where he worked on innumerable occasions yet McGhee failed to report this to the police nor did he initially recognize Tranowski as the man he had chased.

Since the undisclosed information is of limited value and since there was other impeachment evidence available at trial, we conclude that there was not a "reasonable probability" that disclosing the Cozza Report would have affected the outcome of the trial. Cf. Kehm, slip op. at 6-7. Our confidence in the outcome of the trial is not undermined.

Although two passages in his brief indicate that Tranowski is arguing that a different materiality standard should apply, that argument is not developed and, in any event, it is clear that "reasonable probability" is the proper standard. A different standard would apply if the government knew of perjured testimony and failed to inform Tranowski, see Kehm, slip op. at 6; United States v. Kaufmann, 783 F. 2d 783 F. 2d. 708, 709 (7th Cir. 1986), but no argument is raised by Tranowski. Tranowski also argues that the district court did not conduct (p. 6) "further proceedings" as required by our order in Tranowski III.

We diagree ---issuing the new judgment was adequatefurther proceedings. Tranowski also tries to argue that our remand in Tranowski III violated the clearly erroneous standard of Fed. R. Civ. P. 52(a). Even assuming he can raise such an argument at this time, see Chapman v. Pickett, No. 84-2842, slip op. at 12 n. 5 (7th Cir. Sept. 15, 1986), the argument is wrong. As discussed above, the materiality determination is a mixed question of law and fact. The ultimate determination is a legal question. Moreover, applying the wrong materiality standard is a purely legal question not subject to clearly erroneous review.

The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	NO. 76 CR 803
v.	)	(80 C 3667)
	)	
STANLEY TRANOWSKI,	)	
	)	
Defendant	)	

ORDER

Pursuant to the mandate of the Court of Appeals filed on December 18, 1985, I have reconsidered defendant's motion for a new trial in light of United States v. Bagley ___U.S. ____ 105 S. Ct. 3375 (1985). I granted defendant a new trial in March of 1985 because I was unable to say beyond a reasonable doubt that that the verdict would have been the same had defendant known of the Cozza report at the time of trial. Applying the test of the Bagley case, I am unable to say that there is "....a reasonable probability that, had the (Cozza

report) been disclosed to the defense, the results of the proceeding would have been different." 105 S. Ct. at 3384. I believe it more likely than not that, had the report been disclosed at trial, the jury would have concluded, as I did after hearing testimony in March of 1985, that Officer Biswurm was mistaken as to what the witness Christopher McGhee had told him. Biswurm's statement (p. 2) contained in the Cozza report, was therefore not likely to have undermined the jury's confidence in McGhee's testimony identifying defendant as the bill passer.

Accordingly, defendant's motion for a new trial is denied, and the petition is dismissed.

DATED: APR. 14, 1986

ENTER: /s/ JOHN F. GRADY
United States District Judge

EXHIBIT "THREE" EXHIBIT "THREE"

JUDGMENT --WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO ILLINOIS 60604

November 15 1985

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

STANLEY TRANOWSKI,	) Appeal from the
	) United States
Petitioner-Appellee	) District Court for
	) the Northern Dist-
v	) rict of Illinois
UNITED STATES OF AMERICA,	) Eastern Division
	) Nos. 80 C 3667 and
Respondent-Appellant	) 76 CR 803
	) Judge JOHN F. GRADY

This cause came before the Court for decision on the record from the United States District Court for the NORTHERN District of ILLINOIS , EASTERN Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment

of the said District Court in this cause appealed from be, and the same is hereby VACATED and the case is REMANDED, in accordance with the order of this Court entered this date.

EXHIBIT "THREE" EXHIBIT "THREE"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO ILLINOIS 60604

Submitted October 29, 1985*

November 15, 1985 (UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35)

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

STANLEY TRANOWSKI, Petitioner-Appellee	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85-1599 vs.	)
UNITED STATES OF AMERICA, Respondent-Appellant	) Nos. 80-C-3667, 76 CR 803) JOHN F. GRADY, Judge

O R D E R

The judgment is vacated and the case is remanded for further proceedings consistent with United States v. Bagley, 105 S. Ct. 3375 (1985).

EASTERBROOK, Circuit Judge, concurring.

The outcome of this case is a foregone conclusion. The district judge has already found that the evidence at issue here -- a report (p. 2) stating that a witness had identified a certain address as the suspect's residence -- did not have any significant effect on proceedings, and that the witness's identification at trial was reliable. Given this finding, the fact that the defendant did not possess the report could not have affected the outcome of the trial. Under Bagley, therefore, the district court was neither required nor authorized to order a new trial. The court's order remand-

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a) Fed. R. App. P., Circuit Rule 14 (f). Petitioner-appellee has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

ing for further proceedings will consume the energy of the parties and the court without affecting the end to which this litigation must come. I would prefer to spare everyone these burdens, but I believe that it is no sin to permit the action to take a longer course, and therefore I concur in the judgment.

THE COURT: All right. Let's take about a five minute recess, and I will give you a decision.

(Brief recess.)

THE COURT: I would like to thank Mr. Echeles and Ms. Stowell for your very fine arguments. As in any difficult case, it is of great assistance to the Court to have able counsel present the opposing positions.

I do find this to be a difficult case, one that changes colors on me every time I look at it. I have (page 51) thought a lot about the test that should be applied, and maybe the reason that gives me difficulty is because the fact situation here is so unusual. If we had a routine fact situation, the question of what test should be applied probably would not even arise.

I reject the idea that it is my job to determine whether I have a reasonable doubt of the defendant's guilt based upon this new evidence. I just do not see that as a workable test. If that were the test, then if I had a reasonable doubt, there would be no point in having a retrial. I would discharge the defendant. If I did not have a reasonable doubt, then applying thesame sort of parallel analysis, I would deny a new trial since the test is whether I have a reasonable doubt, and if I do not have one, the defendant is not entitled to a new trial.

Neither of those results strikes me as proper. The defendant asked for and received a jury trial. The question of reasonable doubt in this case is for the jury. Therefore, it seems to me that the question of whether new evidence creates a reasonable doubt is necessarily a question as to whether that new evidence could

create a reasonable doubt in the mind of a jury.

It is my belief from the few authorities there are on this question that unless I can say beyond a reasonable doubt that no jury could reasonably entertain (p. 52) a reasonable doubt based on this new evidence that the petitioner is entitled to a new trial.

Now, in making that determination, I do not make the ultimate decision as to whether the new evidence is true or not. The question is: Assuming the truth of the new evidence, could it create a reasonable doubt when taken with all of the other evidence in the case ?

I am sure there are exceptions to that last statement. If the new testimony or evidence is highly unlikely, inconsistent with the other evidence in the case or otherwise facially flawed, surely the Court would be entitled to say that the evidence lacks a degree of credibility that would be sufficient to cause a jury to entertain a reasonable doubt.

But in those situations where the Court cannot say that; that is, where the new evidence may or may not be true, then I do not think it is for the Court to make that decision. And it is in that connection that the reasonable doubt test comes into play. Unless I can say beyond a reasonable doubt that this new evidence is untrue or even that if true a jury would regard it as something which does not create a reasonable doubt of the defendant's guilt, then I must award a new trial.

The question that we have to determine here ultimately is whether Peter McGhee, in fact, identified (p. 53) a person other than Stanley Tranowski as the passer of the bills in question. If he did, then notwithstanding his later identification of Stanley Tranowski as the passer of the bills, clearly, that other identification is something which a reasonable jury could find creates a reasonable doubt of the defendant's guilt.

The fact that the defendant Tranowski ordered paper which appears to be the paper on which these bills were printed and did so under circumstances which certainly indicate guilty knowledge is consistent with the proposition that he was the passer of these bills, but that is all you can say about it. There is no inconsistency between the proposition that Stanley Tranowski knowingly purchased the paper that was to be used in counterfeit bills or even that he was the counterfeiter, on the one hand, and the proposition that he did not pass these particular bills at the Burger King on May 12, 1974, on the other. That is why they are two separate crimes: Counterfeiting and uttering counterfeit currency. One can do one without the other.

The evidence of the paper purchase was highly relevant since it tended to make the proposition that Stanley passed the bills more

likely than it would have been without that evidence. But as Mr. Echeles correctly points out, without the identification by Peter McGhee (p. 54) there would be no case here. There would be no case for a jury. There would be merely suspicion. In fact, without the testimony of McGhee, there is not even a suspicion that Tranowski passed the bills since no one else besides McGhee identified him as the passer.

As I said a few moments ago, the ultimate question is whether McGhee identified someone other than Tranowski as the passer. We will never know that for sure, but it is to assess the likelihood of that fact that we look at what evidence is available.

The evidence that is available is the Cozza report of October 22, 1974. That is second-hand hearsay to the effect that McGhee did make such an identification. It is a report by Cozza as to what Biswurm told him, Biswurm, that McGhee had said.

When I entered an order granting this hearing, I said that the outcome would depend upon the significance of the information contained in this report. What did McGhee do ? The only way we can decide what McGhee did in regard to these two addresses on Saint Paul Street is to try to find out what he said he did, and the Cozza report is some evidence of what McGhee said he did.

If I were to decide this case myself, I would find that Biswurm is incorrect. I would find that Biswurm was not told by McGhee that McGhee knew that the (p. 55) suspected passer resided at 5157 West Saint Paul Avenue or that he had seen the suspected passer enter that address. Yet Agent Cozza quotes Biswurm as having reported that McGhee did say that, that the suspected passer resides at 5157 West Saint Paul Avenue.

Now, it is not clear just what Biswurm was told by McGhee, but he was told something that caused him to report to Cozza that the suspect resided at 5157 West Saint Paul Avenue.

Biswurm seemed to me to have a memory of this series of events that had been seriously eroded by time. It is not clear to me what he remembers at this late date. I was surprised that he could not even remember that he had testified in the related case five years ago. But I cannot find beyond a reasonable doubt that McGhee did not tell Biswurm that the suspect resided at 5157 West Saint Paul Avenue. I think it is highly likely that he did not say that, and even if he did say that, if I were making this decision myself, I would be inclined to say that even though he jumped to an erroneous conclusion about where Tranowski lived on the basis of having seen Tranowski approach what appeared to him to be this address

of 5157 Saint Paul, it was, nonetheless, Tranowski that he identified on each occasion, and it was Tranowski that he trailed to whatever addresses on whatever streets he might (p. 56) have trailed him to.

I would be inclined to make that finding on the basis of McGhee's unequivocal identification of the defendant here in this courtroom last week and at the original trial of this case. McGhee strikes me as an intelligent young man. There was an excellent opportunity to identify the defendant during the chase. It is true that the defendant has lived in the neighborhood for many years. He does frequent the place where McGhee worked. It is also true that Stanley Tranowski is a distinctive-looking individual. He is not someone who has what you might call an average appearance. I have no doubt in my mind that if Stanley Tranowski spent a lot of time around the neighborhood there, as he apparently did, that McGhee and

the other young people in the neighborhood would have recognized him.

Therefore, I would be inclined to conclude that whatever confusion may exist because of Biswurm's accurate or inaccurate report to Cozza this does not cast a doubt on McGhee's identification of Stanley Tranowski sufficient to warrant either his acquittal in this case of a bench trial or a new trial in the event I am to decide what a jury would do. I am not, however, as I understand the law, authorized to make the jury decision, to make the factual decision. If there were nothing to throw any (p. 57) doubt on McGhee's identification of Stanley Tranowski other than Biswurm's testimony or, rather, Cozza's report about the matter of residing at 5157 West Saint Paul Avenue, I might even then say that the petitioner has not made out a sufficient case for a new trial.

But there are other factors. The principal one is the failure of McGhee and of Fusello

and of Biswurm to notify the Secret Service that the bill-passer was coming into the drugstore practically every day between May and October of 1984. There are many possible explanations for that, and that is exactly the point. I cannot single out one and say that is the explanation.

One explanation is that McGhee really was not so sure, that McGhee did not say to Fusello "Isn't that the guy ?" or that Fusello did not say to Biswurm, "Biswurm, McGhee tells me that this suspect is coming in here every day." If they did not make any reports, that seems to me to shed some doubt on the proposition that McGhee had an opportunity to make a solid identification of the defendant on May 12th and remembers enough of the event to be able to identify that person again a short time later.

I would be inclined to chalk this whole thing up to incompetence on the part of the investigating authorities, and I say that quite

seriously. Biswurm seems to (p. 58) me to have been generally uninterested in the matter beyond talking to McGhee about it occasionally. Nobody from the Secret Service followed up on it with any consistency, and there may have been explanations for that in terms of the other demands upon their time. But it seems to me that the Secret Service just sat there and waited for reports to come in, and when reports did not come in, nothing happened.

That nobody checked out who lived at 5157 West Saint Paul Avenue in terms of physical description seems to me to be rather slipshod investigation. Here even now 11 years later, we do not know whether the Stanley Sikora who lived there at that time looked anything more like Mr. Tranowski than Peter McGhee does. Certainly if it turned out that there was a dead ringer for Stanley Tranowski who lived at that address, it would tend to make more likely the proposition that McGhee did indeed

follow the wrong person to that address. If no resident in that home looked remotely like Stanley Tranowski, it would tend to make that proposition less likely.

I think the question of McGhee's eyesight has been adequately explained. I attach no significance to that. I think that there is some mileage to be gained out of the fact that Tranowski continued coming into the drugstore and confronting McGhee frequently although I suppose that could be explained on the basis that Tranowski had a whole (p. 59) pack of pursuers holding him at bay that day, and he did not necessarily recognize all of them when he saw them later.

Biswurm's testimony at the Tranowski trial about McGhee taking him someplace on Wabansia Street and telling him he thought that may be where the suspect lived would certainly be an additional piece of evidence that a jury might find significant on the question of reasonable

doubt. I would not grant the petition on that basis, however, because I am not satisfied that the Government had that information at the time of Stanley Tranowski's trial. While Biswurm says that he told that to Cozza, my impression of Biswurm's recollection is not such that I would credit that testimony even in the absence of a denial by Cozza. I am not saying it is not true, but Biswurm, who could not even remember testifying five years ago, having a memory of that occurring 11 years ago, does not really impress me.

The Dolan-Sullivan report may have been available to the Government. I do not know whether it was or not, and I do not base today's decision on any failure to turn over that report. It is not clear to me to what extent that report impeaches McGhee in any event. There is nothing really impeaching about McGhee's identifying Tranowski as the bill-passer and thinking that Tranowski lived on Wabansia or

Concord or any other street in the neighborhood. It may well be that Tranowski walked on those (p. 60) streets and was seen by McGhee on those streets at some time.

The thing that distinguishes the Cozza report of October 22, 1974, is that that report puts into the mouth of McGhee, albeit by secondhand hearsay, the statement that the suspect lived at an address where Stanley Tranowski did not live.

A final consideration that is not unimportant to me is the fact that the Cozza report clearly should have been turned over by the Government. If it were arguable that that statement atttirbuted to McGhee, if made, were not impeaching, I might reach a different result, but it clearly is impeaching, if made and if made in the circumstances which the petitioner can argue with some plausibility that it was made.

All the Government had to do to eliminate this whole controversy that has now raged up and down the courts for the last five years and will undoubtedly go on for another five is to turn over Cozza's report of October 22, 1974, which was just as clearly Brady material as anything could be. I know that Ms. Stowell had nothing to do with the failure to turn it over. I know that the United States Attorney's office had nothing to do with the failure to turn it over. Somebody, intentionally or unintentionally, failed to turn it over. It does not even make (p. 61) any difference whether it was intentional or unintentional. It should have been turned over. It was not.

I cannot and will not say that I know beyond a reasonable doubt what would have occurred in the minds of the jury if it had been turned over. Therefore, I have concluded that the petition must be allowed. The petitioner will be granted a new trial.

Now, it may well be that the Government desires to appeal today's ruling. I would be the last to say that my decision is not one about which reasonable minds could differ. Quite frankly, I am not anxious to retry this case only to find out that we should not have had the re-trial. So I would welcome an appeal of today's order by the Government so that we know for sure that we are not simply wasting time when we embark upon the second trial of Stanley Tranowski.

Is there anything else we should do today ?

MS. STOWELL: Your Honor, may I just say one thing ? Your Honor said an important part of your decision was the fact that no reports were made by Pusello, Piswurm, and McGhee, and the Secret Service. There was a document admitted into evidence. I do not have the one with the sticker. I think I gave it to Mr. Martinez. But it is a report dated August 22nd 1974, by Agent Clark. On that report on page

3 is a paragraph - - (p. 62) And I am not arguing with your Honor.

THE COURT: Right.

MR. STOVALL: I just want you to understand that. I just want to call it to your attention that:

"On August 20th, 1974, Mr. Clark telephoned Robert Fusello at Mor-Clare, and he told me that the suspect had started buying papers at the store again on or about August 10th or 11th and that he was coming in around 5:30 or 6:00 p.m."

So to the extent that has any bearing on your Honor's decision, I wanted you to be aware of that.

THE COURT: That contrasts with McGhee's testimony that Stanley Tranowski started coming in again on a daily basis about two weeks after May 12th. Actually, if you take the Fusello report in August, it tends to be evidence favorable to Tranowski because if, in fact, Tranowski was coming in for two months before

Fusello finally woke up to the fact that this was the fellow that McGhee had identified, it tends to throw doubt on whether McGhee, in fact, had previously identified him.

MR. SCHELLS: It is my view, your Honor having ordered a new trial, that your Honor should set a date for the new trial, tentative or otherwise. Maybe the Government will come in - -

THE COURT: Is there any doubt that this is an (p. 63) appeable order ?

MS. STOWELL: Your Honor, I do not think there is any doubt. I have not discussed it anybody downstairs. That is the reason I do not want to take an adamant position as to what to do.

THE COURT: I think, in fact, under the amendments to the criminal code that the grant of a new trial by the Court is appealable by the Government.

Ms. STOWELL: It sounds right.

THE COURT: You might take a look at that.

Ms. STOWELL: I will.

Mr. ECHELES: I did not mean to interrupt the Court. This is a 2255 petition.

THE COURT: I understand that.

Mr. ECHELES: At the risk of Stanley disagreeing with me, although we have had no disagreements, nowit is an appealable order. It is different from the grant of a new trial on trial, on a jury verdict on trial.

THE COURT: This is a civil case.

Mr. ECHELES: It is a civil case.

I have to agree with Ms. Stowell. I have to say to the Court in response to the Court, as I have to Mr. Tranowski, you Honor having ruled on a 2255 petition, it being civil case, in my view, it is an appealable order.

THE COURT: But you think that perhaps --

MR. SCHELLS: I think now your Honor has no papers or documents. There is no notice of an appeal.

THE COURT: I should set a new trial at this point.

MR. SCHELLS: That is my reaction. You cannot say new trial and let it be in limbo. You have to say new trial. He now starts the speedy trial, I suppose. I do not know the overlay on that one, but I think you have to set a tentative date. That would be my suggestion, your Honor.

THE COURT: Well, let's regard this then for purposes of that supposition as being the date on which the Speedy Trial Act is figured, and we have what, 70 days from that ?

MS. STOWELL: Yes, your Honor.

THE COURT: Well, how about we set a new trial on Monday, May 20th ? That just barely squeaks in under the 70 days.

Let's do a little better than that. Let's set it for Monday, May 6th.

Now, by that time you will have filed your appeal, and you will have had a chance to look into the speedy trial question. Surely, there is some exclusion, if only the one that has to do with the interests of jus- (p. 65) tice that would apply while an appeal is pending on the 2255.

MS. STOWELL: We will work it out.

THE COURT: Very good.

MS. STOWELL: Thank you, your Honor.

THE DEFENDANT: Your Honor ?

MS. STOWELL: Your Honor, could I have the exhibits ?

THE COURT: Yes, I will give those back.

Mr. Tranowski ?

THE DEFENDANT: I would like to thank the Court's indulgence for the entire time that the Court has spent in the conduct of this trial or this hearing.

THE COURT: Well, you are entirely welcome, and you really do not have to thank me because that is what I get paid for. I am a civil servant, and I am just doing my job.

THE DEFENDANT: All right.

MR. ECHELES: Judge, I did not get to say thanks.

I remember when Judge Barnes was sitting. You may remember Judge Barnes.

THE COURT: Yes, indeed I do.

(Brief off-the-record discussion.)

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

Transcript for the record of proceedings in the above entitled matter.

/S/ LAURA M. BRENNAN 3-16-85
Laura M. Brennan Date
Official Court Reporter

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO ILLINOIS 60604

Argued September 21, 1978

September 25, 19 78

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, Jr. Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee vs. STANLEY TRANOWSKI, Defendant-Appellant	) Appeal from the United States District Court for the Northern District of Illinois. Eastern Division. No. 76 CR 803) John F. Grady, Judge

No. 78-1272

O R D E R

After a jury trial, defendant was convicted of passing a counterfeit $5 bill to Burgher King cashier Michelle Bonsanto on May 12,1974, in Chicago, Illinois, in violation of 18 U.S.C. Sec. 742. He received a six-year sentence.

After hearing oral argument only from defendant's appointed counsel, we affirmed this conviction from the bench.

Defendant first argued that the Government should not have been permitted to introduce into evidence 27 photographically identical counterfeit bills which had been passed at various places in Chicago between May and October 1974. At the oral argument, defendant's counsel admitted that under 18 U.S.C., Sec. 472 the United States had to prove criminal knowledge or intent to defraud. The additional countrfeit bills were some evidenceof such intent. These bills were linked to defendant because they were printed on paper chemically identical to the Gilbert Resource bond paper defendant had bought under false names for a fictitious business in May and June 1973. One of the additional bills bore a "gilbert" watermark. The defendant had been observed by a United States Secret Service agent

delivering the first batch of paper to a store leased by his brother in Chicago. The evidence of the additional counterfeit bills, together with the evidence of the surreptitious purchases of paper of the same kind and brand used in the bills, was admissible both as tending to establish defendant's guilty knowledge and also to show his plan to manufacture counterfeit bills, thus tending to show he knowingly passed the bill in question. The jury was instructed that this evidence was received only "for whatever bearing it may have on the question of whether the defendant passed the particular note which is the subject of the indictment." Since this material had a "tendency to make the existence of an element of the crime charged more probable than it would be without such evidence," it was properly received in evidence. United States v. Fairchild, 528 F. 2d 185, 188-189 (7th Cir. 1975), certiorari denied, 425 U.S. 942; United States v. Kimbrough, 481 F. 2d 421 (5th Cir. 1973),

Defendant also contended that he was not identified as the person who passed the counterfeit bill. However, David Jochum, the manager of the Burger King Restaurant where the counterfeit bill was passed, unsuccessfully chased a fleeing white man answering cashier Michelle Bonsanto's description of him just after the counterfeit bill was passed to her. At a photo spread on January 28, 1975, Jochum picked out a 6-year-old picture of defendant's brother as the individual "most closely resembling" the person he had chased instead of a 27-year-old picture of defendant. The recent picture of the brother resembled defendant at the time of the chase more than the 27-year-old picture of the defendant himself. Additionally, Peter McGhee, an employee of the drug store frequently patronized by defendant, helped the Burger King manager chase the man who fled after the counterfeit bill was passed and positively identified defendant as the subject of the chase. Finally, McGhee's employer saw defendant in the drug

store just before the event in question, thus destroying defendant's alibi that he was attending a wake. Therefore, we conclude that defendant was sufficiently identified as the person passing the counterfeit bill.

Conviction affirmed.